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THE PROGRESS OF THE LAW, 1919-1920

THE CONFLICT OF LAWS

THE NATURE, ORIGIN, AND EXTENT OF LAW

PERHAPS the most important question in the Conflict of Laws is involved in a learned article by Professor Lorenzen.¹ This article deals with cases where general concepts — such as *domicil*, *movables*, *locus contractus*, *locus delicti* — have a different meaning in two states concerned in a legal relation. Much authority is brought together in this article. In the opinion of the present author, the subject possesses no practical difficulty, though it offers an interesting field for study. Each court in which a question arises involving the conflict of laws must decide it according to its own ideas. If a question arises in an English court as to a domicile in France, the English court must apply its own ideas of domicile to the determination of the question, just as it would apply its own ideas of procedure or evidence.

II. In *In re Tallmadge*,² the vexed question of the *renvoi* was presented by proceedings on the will of a person who died domiciled in France though a citizen of New York. In a learned and exhaustive report, which was confirmed by the Surrogate, Mr. Referee Winthrop gave the first thorough discussion of the subject in an Anglo-American court, decided that the *renvoi* is no part of New York law, and therefore applied the conflict of laws of New York to the question of what law governs, as every court should do, and applied the law of France to the inheritance.

III. The question of the legislative jurisdiction of a state is neatly raised by the case of *American Fire Ins. Co. v. King Lumber & Mfg. Co.*³ A contract of insurance on Florida property was made by correspondence between a Florida broker and a Pennsylvania company; the contract being completed by mailing the policy from

¹ Ernest G. Lorenzen, "The Theory of Qualifications in the Conflict of Laws," 20 COL. L. REV. 247.

² 109 N. Y. Misc. 696, 181 N. Y. Supp. 336 (1919).

³ 39 Sup. Ct. Rep. 431 (1919).

Pennsylvania. Certain representations had been made by the broker to the assured. A Florida statute provided that any person "who directly or indirectly makes or causes to be made" any policy for or on account of an insurance company should be taken as its agent. The Florida courts had held that this provision applied, and that the representation of the broker bound the company. This decision was upheld by the Supreme Court.

The court did not deny that the legislative power of Florida is confined within the territorial limits of the state; but it held that the company, by consenting to a contract through a Florida broker, was subject so far as the contract was concerned to the Florida law.

This presents an interesting question as to the law applicable to an interstate contract made by correspondence. A promise made by mail or telegraph "speaks" to use the language of Mr. Justice Lindley⁴ "in the place where it is received." While therefore the place of mailing a letter may impose a liability⁵ this must be subject also to the legislative power of the place of receipt, to the extent of affecting the nature of the offer and the instrumentalities both of offer and of receipt. The relation of the broker who transmitted the offer and to whom the acceptance was sent to complete the contract was therefore subject to the regulation of the state of Florida.

DOMICIL

In *Blaine v. Murphy*⁶ we have a new phase of the difficult question of domicile where the dwelling-house is cut by a boundary line. The question was, whether the federal court had jurisdiction on the ground of diverse citizenship. The plaintiff was a citizen of New York; the defendant claimed the same citizenship. It appeared that the defendant conducted a hotel on the line between New York and Massachusetts. The boundary had been marked by a monument which if correct showed that all the house except one or two unimportant rooms lay in New York. The owner had always regarded himself as domiciled in New York; license papers were taken out there, legal descriptions had ascribed him to New York, and the will of the ancestor and former owner had been proved there. But in the last perambulation and remarking of the

⁴ *Bennett v. Cosgriff*, 38 L. T. N. S. 177 (1878).

⁵ *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632 (1886).

⁶ 265 Fed. 324 (1920).

boundaries it was found that the monument at the hotel was fifty feet out of the way, and that the principal part of the building was in Massachusetts. The court held that the defendant was domiciled in Massachusetts. The intention necessary to fix a domicile is the intention to live in a certain place, not an intention to be domiciled in the territory of one or another sovereign. To quote the language of Young, J., in *Kerby v. Charlestown*,⁷ "A man's home is where he makes it, not where he would like to have it."

Another element possibly enters into this case. The difficulty is caused by an artificial situation created by the boundary line. In fact, is a man's home limited to a room, or to a house? If a man lives on a farm, is he not at home in every acre of the land as well as in the house? This may be doubtful; but as to the four walls of his castle there is no doubt — he is at home in any part of the enclosed dwelling-place. In the case under discussion the real home was in both states. The technical domicile must be fixed by law in the one state or the other, and when once fixed it abides until the entire home is left. Under the circumstance of the misplaced boundary-stone, it might be claimed that the domicile *de facto* was in New York. On the whole, however, this contention must fail; for, as the court found on a petition for rehearing, the change was not of the boundary, but only of the wrongly-placed monument. There had therefore been no *de facto* domicile in New York as a result of this wrongly-placed monument.

SITUS

I. There is growing recognition of the fact that a trust estate, as a composite *res*, may, like the assets, tangible or intangible, gathered together for doing business, have a fixed situs of its own; which need not be called "the seat of the trust," but might as well be called that as anything else. The seat of the trust is the place where it is created to be administered. There seems to be no legal reason why the trust *res* should not be taxed at the seat of the trust.⁸ In *Thorne v. State*⁹ the Supreme Court of Minnesota, citing the passage just referred to, allowed a succession tax on trust shares owned by a non-resident, the trust *res* consisting of shares in do-

⁷ 78 N. H. 301, 99 Atl. 835, 838 (1916).

⁸ 32 HARV. L. REV. 632.

⁹ 177 N. W. (Minn.) 638 (1920).

mestic and foreign corporations, held by Minnesota trustees who received dividends from the corporations, paid expenses, and declared and paid dividends to the holders of the trust shares.

In *State v. Phelps*,¹⁰ a trust fund created by a Wisconsin will, the trustees being accountable to a Wisconsin court, included stock in a Philadelphia corporation; which by arrangement with the trustees paid dividends directly to a Pennsylvania beneficiary. The beneficiary on receiving a dividend sent a receipt for it to the trustees, who included it in their account. It was held that a Wisconsin income tax was payable on the dividends.

II. *Greenough v. Osgood*,¹¹ was another case in which the "seat" or "situs" of a trust was considered. An ante-nuptial settlement by a woman domiciled in New York had placed in the hands of Massachusetts trustees an estate consisting of personalty, most of it in Massachusetts, and of Massachusetts land. The trustees filed a bill for instructions. The court found from these facts that the settlor intended the estate to be administered in Massachusetts, and that the bill would therefore lie; and proceeded to give instructions according to Massachusetts law.

III. In *Primos Chemical Company v. Fulton Steel Corporation*¹² the court decided that a deposit in a bank within the district did not constitute "property of a fixed character" so as to give the Federal courts jurisdiction to appoint a receiver for property of an absent owner. The deposit was a "live" account, with an average balance of about \$4000. The decision was placed upon the ground that money deposited is the property of the bank, and the depositor is merely a creditor. No authority was cited on the point, which was treated as too clear for doubt — as indeed, on principle, it is. But it would seem that the court should have distinguished the case of *Blackstone National Bank v. Miller*,¹³ in which Mr. Justice Holmes upheld a tax upon the bank deposit of an absent depositor on the ground (with another) that it constituted property within the jurisdiction. This theory has been subsequently acted on by the same court.

¹⁰ 176 N. W. (Wis.) 863 (1920).

¹¹ 126 N. E. (Mass.) 461 (1920).

¹² 254 Fed. 454 (1918).

¹³ 188 U. S. 189 (1903).

TAXATION

I. In a series of articles by Professor Powell,¹⁴ powerful, well-reasoned and exhaustive, a novel and difficult question of the jurisdiction to tax is considered. This same question has formed the subject of several decisions of the Supreme Court of the United States, which carry further the tendency noted a year ago.¹⁵ In *Shaffer v. Carter* the court again upheld the Oklahoma income tax on income derived by a non-resident from Oklahoma oil-wells;¹⁶ and this decision was followed in *Travis v. Yale & Towne Manufacturing Company*.¹⁷ The Supreme Court also affirmed¹⁸ the decision of the Supreme Court of Massachusetts in *Maguire v. Tax Commissioner*, discussed a year ago,¹⁹ which holds that the Constitution of the United States is not violated by taxing the income received by a domiciled beneficiary of a foreign trust.

II. Several cases involving the incidence of taxation on persons or property outside the state have been already sufficiently considered.²⁰ The most extraordinary of these decisions is *Colorado v. Harbeck*,²¹ where the Appellate Division of the Supreme Court of New York has allowed the State of Colorado to maintain an action for the recovery in New York of the amount of a tax assessed in Colorado.

JURISDICTION OF COURTS

I. In *Shipley v. Shipley*,²² it was held that a wife might sue her non-resident husband for separate support, obtaining jurisdiction by attaching his property within the state; and though she could not obtain a valid personal judgment against him, she could thereby have his property applied to the satisfaction of her claim. This is

¹⁴ Thomas Reed Powell, "Extra-Territorial Inheritance Taxation," 20 COL. L. REV. 1, 283.

¹⁵ 33 HARV. L. REV. 8.

¹⁶ *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. Rep. 221 (1920).

¹⁷ 252 U. S. 60, 40 Sup. Ct. Rep. 228 (1920). These two cases were commented on in 20 COL. L. REV. 457, by Professor Powell.

¹⁸ *Maguire v. Trefry*, 40 Sup. Ct. Rep. 417 (1920).

¹⁹ 33 HARV. L. REV. 8.

²⁰ *Maxwell v. Bugbee*, 40 Sup. Ct. Rep. 2 (1919), commented on in 33 HARV. L. REV. 582. See *Cream of Wheat Co. v. Grand Forks*, 40 Sup. Ct. Rep. 558 (1920).

²¹ 106 N. Y. Misc. 319, 175 N. Y. Supp. 685 (1919), commented on in 33 HARV. L. REV. 840.

²² 175 N. W. (Ia.) 51 (1919).

an interesting though plain application of jurisdiction *quasi in rem*.²³

II. The nature of the act of probating a foreign will was considered in *In re Longshore's Will*.²⁴ A resident of Iowa owned land in Nebraska, and on his death his will was probated there. It was then offered for probate in Iowa as "a will probated in another state." The court held that it could not be probated as such, but in the regular form required for an Iowa will. The foreign probate, the court said, operated only *in rem* upon the foreign property, and did not establish, by a decision entitled to full faith and credit, the validity of the will.

In the case of land this is very clear. The will of land is a distinct conveyance, apart from its effect in disposing of the personalty; it may be good where the land lies, though bad by the law of the domicile and therefore not a valid disposition of the personalty. Even as to the personalty in the foreign state, that state may set up its own rules for the disposition of it, differing from those of the domicile; Illinois has done so, and its action was upheld as constitutional in *Headen v. Cohn*.²⁵ In such a case, the probate would no more affect the validity of the will at the domicile than in the case of land. But even if the foreign state held unchanged the doctrine that the law governing the devolution of movables is that of the domicile, and by its decision held the will valid according to the law of the domicile, probated it, and distributed the chattels in its territory accordingly, this would still not be a judgment to which the domicile must give full faith and credit.²⁶

A decree for the probate of a will may in fact operate, as the court says, *in rem* upon certain property; or it may act *in rem* upon the will itself, determining its validity. As a will of personalty, its validity can be determined only by the courts of the domicile; but any court may give it effect merely as to the property within its jurisdiction.

III. In *Hunau v. Northern Region Supply Co.*,²⁷ Judge Learned Hand takes up again the question of jurisdiction to sue a foreign corporation. He corrects a misunderstanding of his lan-

²³ See a comment on this decision, 20 COL. L. REV. 479.

²⁴ 176 N. W. (Ia.) 902 (1920).

²⁵ 126 N. E. (Ill.) 550 (1920).

²⁶ *Overby v. Gordon*, 177 U. S. 214 (1900).

²⁷ 262 Fed. 181, 183 (1920).

guage in the first article of this series,²⁸ in which he was ranked with Professor Scott as maintaining the opinion that "by causing a particular act to be done within a state, the corporation submits the act to the provisions of the state law . . . the obligation to submit all litigation growing out of the act to the courts of that state." This language was not his, but represented an unfortunate attempt of the present author briefly to state the substance of his view. His view as now explained appears to coincide with the common opinion that a corporation may be "found" where it commonly "does business." His felicitous language is worth quoting.

"How far a corporation is immanent in every authorized act of its agents anywhere, and what will be the eventual basis of its subjection to foreign process, it is not necessary to consider; but it is clear that at present some general activities are necessary."

In another case the question of the liability of a foreign corporation to be sued where it did business is considered. In *Chipman v. Thomas B. Jeffery Co.*,²⁹ a foreign corporation, having authorized a person within the state as its agent to receive service of process, according to the New York law, thereafter ceased to do business in the state. Judge Augustus Hand held that the authority created in accordance with the statute ceased when the corporation ceased to do business within the state, except as to obligations arising within the state. Accepting Judge Holmes' distinction³⁰ between jurisdiction based on express consent and that based upon doing business without giving express consent to be sued, but doing acts which are to be taken as implying such a consent. Judge Hand held that in the latter case the extent of the consent was a question of construction; and that there was no jurisdiction in a case not covered by the consent, whether or not there might have been jurisdiction if no express consent had been given.

Judge Hand adds that where there is no express consent the jurisdiction is based on "a so-called estoppel on the part of the Corporation to object to service in actions based upon local transactions."³¹

²⁸ 33 HARV. L. REV. 10.

²⁹ 260 Fed. 856 (1919).

³⁰ *Pennsylvania F. I. Co. v. Gold Issue M. & M. Co.*, 243 U. S. 93 (1917).

³¹ See valuable comment on this case, 33 HARV. L. REV. 730.

STATUS

I. In *Arani v. Public Trustee*,³² a Maori had adopted a European child, with due tribal ceremonies; on the death of the adoptive father the child claimed to inherit. By Maori custom a European child could not be adopted. Adoption was however provided for in an Act of Parliament, applicable in New Zealand. The Judicial Committee, Lord Phillimore writing the opinion, held that the child might inherit. The court said that though the adoption was not permitted by the tribal law the Maori might avail himself of the Act of Parliament.

It is to be noted that the Maoris are governed by their own tribal law, administered by native courts, although they are full citizens of New Zealand; and that the formalities of adoption in this case were those provided by the tribal law. This option given to a native to select certain features of the territorial law, while still governed in general by the tribal law, is certainly novel.

II. In refusing to grant a divorce from a polygamous marriage contracted where such a marriage was valid, the court in *Hyde v. Hyde*³³ carefully guarded its opinion by adding, "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions." Such caution was necessary in the courts of a country which governs millions of Mohammedans. Following this cautious assurance, the Privy Council in *Cheang Thye Phin v. Tan Ah Loy*,³⁴ allowed a widow's share of the property of a Chinese resident in Penang, to a "t'sip" or subordinate wife, although there were two wives of the first rank.

III. In several cases the jurisdiction of a court to decree custody of a child has been considered. In *Hartman v. Henry*,³⁵ the Juvenile Court in Kansas City, Mo., awarded to the respondent custody of a child found wandering neglected in Kansas City, Mo. The petitioner had already been appointed guardian by a Kansas court, and brought his writ of *habeas corpus* to obtain custody of the child. The Supreme Court held that the Juvenile Court had jurisdiction

³² [1920] A. C. 198.

³³ L. R. 1 P. & D. 130, 138 (1866).

³⁴ [1920] A. C. 369.

³⁵ 217 S. W. (Mo.) 987 (1920).

to award custody of the child in Missouri, and the propriety of its action in this case could not be brought in question by this writ.

The decision is an application of the well-established principle that the sovereign, through his proper court, is the protector of every person within his jurisdiction who needs protection; and he may under this power take a foreign child away from his parent or his proper domiciliary guardian.³⁶

In *Groves v. Barto*³⁷ upon a divorce in Colorado the custody of the child had been awarded to the mother. The mother then changed her domicil to Washington, the father assenting. Several months later the father secured a modification of the original decree according to which custody of the child was awarded to him; and then applied to the Washington court to give him possession of the child. This application was refused, on the ground that the change of domicil deprived the Colorado court of any further control over the child. The court also found that the welfare of the child would best be subserved by the mother's custody. The decision may, it would seem, be sufficiently rested on the first ground.³⁸

In *Griffin v. Griffin*,³⁹ a California mother, upon a decree of divorce, had been awarded custody of the children; and had been forbidden to remove them from the county without permission. She secured permission to take them to Oregon, on condition she brought them back at a certain time. Instead of returning, she acquired a domicil in Oregon. As a result of her action, the California court modified its decree and awarded custody to the father, who brought *habeas corpus* in Oregon to obtain the children. The court denied the petition upon two grounds: first, that the best interests of the children demanded that they remain with the mother; second, that at the time of the last California decree the children were domiciled in Oregon and the California court no longer had jurisdiction over their status.

The first ground seems rather questionable. There was no finding unfitness on the part of the petitioner, as in the former case. Has the sovereign within whose territory a minor is found power

³⁶ *Woodworth v. Spring*, 4 Allen (Mass.) 321 (1862).

³⁷ 186 Pac. (Wash.) 300 (1919).

³⁸ See this case commented on in 20 COL. L. REV. 491.

³⁹ 187 Pac. (Ore.) 598 (1920).

to award custody of the child away from its otherwise fit parent or domiciliary guardian, merely because he believes the welfare of the child will thereby best be secured? In *Nugent v. Vetzera*,⁴⁰ the English court thought not; and sent several children of an English mother, who had been brought up in the English customs and religion, to their Austrian guardian, although the court felt that the welfare of the children would suffer thereby. In cases of temptation an English court has undoubtedly without due consideration acted otherwise.⁴¹ The American courts are somewhat more liberal; but it is doubtful whether the mere supposed "welfare" of the child would induce any court to remove a child from the custody of a not unfit guardian. A doctrine which would allow the court to do so would be a very dangerous one.

The second ground, however, seems sound, though it involves novel doctrine. That the California court cannot by its order constrain an adult person, not a wrongdoer, to remain in the state, and cannot prevent his acquiring a new domicile for himself, is certain. But the fact that the mother acquired a new domicile for herself in Oregon does not necessarily mean that the children's domicile also changed, and there is little authority on the point. It is submitted, however, that upon divorce the parent with whom the child actually lives acquires or retains the power over the child's domicile. Whether this suggestion goes too far or not, at any rate it seems clear, as this case decides, that the parent to whom the general custody is awarded obtains this power, and may exercise it even against the order of the court. The court might have put an end to the mother's custody while she remained in California; its power over her and the children ceases when they cease to be there domiciled, and its decree can no longer affect their status.

IV. One Chaloner had been declared of unsound mind by a New York court, and a committee appointed to take charge of his property. He being domiciled in Virginia, an inquiry was instituted as to his sanity and he was declared sane and competent. Upon his removal to North Carolina similar proceedings were held, with a like result. He then brought an action in a New York court, and the defendant pleaded his incompetence to sue.⁴² The court held

⁴⁰ L. R. 2 Eq. 704 (1866).

⁴¹ *Johnstone v. Beattie*, 10 Cl. & F. 42, 150 (1843).

⁴² *New York Evening Post v. Chaloner*, 265 Fed. 205 (1920).

that capacity to sue is a matter for the law of the forum, and not, as a status, determined by the law of the domicil. That capacity to take part in a legal act is not a kind of status is well settled in this country.⁴³

PROPERTY

I. Bartolus has been blamed by scores of writers incapable even of understanding him for basing his distinction between "personal" laws and laws of property upon the context, and especially on the relative position of the various phrases. In *Gwynn v. Rush*,⁴⁴ we have a proof of the genius of Bartolus, who caught the distinction four hundred years before legal science was ready for it. It was provided by a statute of Arkansas that in every final judgment for divorce granted to the wife, she should be entitled to a third of her husband's estate; and every such final judgment shall designate the specific property which should make up the third. Gwynn's wife obtained a divorce from him in Tennessee. Gwynn afterwards contracted to convey Arkansas land; the buyer refused to accept a deed unless the divorced wife was a party to it; and Gwynn brought this bill for specific performance of the contract. The court held that the statute regulated procedure in judicial proceedings for divorce, and did not constitute part of the law of property; it applied therefore only to divorces in Arkansas. Even though, as in this case, the court which pronounced the decree in Tennessee assigned the Arkansas land to the wife, this had no effect on the title. The land not having been transferred in the only way in which, by Arkansas law, land could be transferred, the former wife had no interest whatever in it.

Another case in which the distinction between a law fixing status and a law of inheritance was fundamental is *Harrison v. Moncravie*.⁴⁵ A wife claimed land in Oklahoma as statutory heir of her husband, of whose killing she had been convicted in Kansas. A statute in both Kansas and Oklahoma provided that no person convicted of killing a person should take land by inheritance or devise from such person. It was claimed that the Kansas statute made the claimant incapable of taking; the court, however, held

⁴³ *Milliken v. Pratt*, 125 Mass. 374 (1878); *Thompson v. Taylor*, 66 N. J. L. 253, 49 Atl. 544 (1901).

⁴⁴ 219 S. W. (Ark.) 339 (1920).

⁴⁵ 264 Fed. 776 (1920).

that this statute fixed the property law, not the status; and though the claimant was domiciled in Kansas the statute of that state, not affecting her status, did not apply.

This opinion is quite in line with reason and authority; but the court further found that the statute of Oklahoma did not apply, since it must refer only to conviction in Oklahoma. The result was that a federal court of equity, sitting in Oklahoma, decreed that this wife, convicted of killing her husband, should take his land as against his innocent daughter. Evidently the blood of a husband does not soil the wife's hands, in Oklahoma.

The few exceptional cases which allow the heir who killed his ancestor to profit by his crime and take the land are not necessarily in point here, because in this case the wife is not defendant but plaintiff. The weight of authority, at common law, is that equity will enjoin the criminal killer.⁴⁶ Here both states had statutes embodying the prevailing view. This view obviously is not based on time or place of killing. Grant that the statute does not affect status or competency, but is part of the land law, it would seem that Oklahoma had forbidden its courts to give the land to a convicted homicide.

The court argues that legislation is territorial and does not affect persons and things outside its jurisdiction: but having already decided that this statute affected land and not persons the subject and operation of the statute are clearly within the jurisdiction; it affects the land, no matter who the claimant. The court also argues that the statute is penal, and must be strictly construed. If so, it either puts a penal disqualification upon a person or deprives him of property. This person, however, has neither qualification nor property unless the statute confers it.

The court cited, in support of its opinion on this point, several cases of the type of *Commonwealth v. Green*.⁴⁷ These cases are all of statutes imposing, on account of conviction of a crime, disqualification to testify in court or to serve on a jury; cases where the person in question is not alleging a right which he claims is given him by law, but is called upon by a third person, who is a party in court, to testify to facts or to sit on a jury. The right involved in this case is that of the party, not of the witness or juror; and its

⁴⁶ SCOTT, CASES ON TRUSTS, 458.

⁴⁷ 17 Mass. 515 (1822).

denial because of the misconduct of a third person, the desired witness or juror, inflicts an undeserved penalty on the party. The statute is therefore closely confined in its application. In this case no such question is involved. If the criminal's right is abridged by his crime he has only himself to thank; the result is not unjust, and there is no reason for restraining the operation of the statute.

II. The question of the effect upon marital property of a change of domicile of the spouses was raised in *Succession of Popp*.⁴⁸ Acquests were made in Louisiana while the spouses resided in that state, and remained there in the form of securities in a safe-deposit box after the spouses removed to Mississippi. On the death of the wife, an inheritance tax was laid on her half of the property in Louisiana. The husband claimed that he already owned the whole estate, his removal to Mississippi having vested the wife's community right in him. The court, however, following the earlier case of *Succession of Packwood*,⁴⁹ held that the acquests vesting under the community law remained community property in spite of a later change of domicile of the spouses.

INHERITANCE

In *Helme v. Buckelew*,⁵⁰ the Appellate Division of the Supreme Court of New York held that an action, under a New York statute authorizing it, could be brought against a foreign executor duly served with process, though there was no estate in New York; and that this judgment would be entitled to full faith and credit in the state of the foreign executor's appointment. Judge Laughlin dissented.

The New York courts had already held that an action *quasi in rem* to subject New York property to the claim of a creditor might be maintained under this statute against a foreign representative.⁵¹ The court had undoubted jurisdiction in that case because of the property. But it is submitted that it is impossible to render a personal judgment against a foreign representative. The claim is not against him; apart from the Statute of Executors, which is re-

⁴⁸ 83 So. (La.) 765 (1920).

⁴⁹ 9 Rob. (La.) 438 (1845), 12 Rob. (La.) 334 (1845).

⁵⁰ 181 N. Y. Supp. (App. Div.) 104 (1920).

⁵¹ *Thorburn v. Gates*, 103 N. Y. Misc. 292, 171 N. Y. Supp. 198 (1918), affirmed 184 App. Div. 443, 171 N. Y. Supp. 568 (1918).

enacted in every state, the executor would be no more liable to pay the debt of the deceased than the heir or any other stranger to the contract. The statute has a double operation; first, it keeps the debt alive; second, it directs the representative to pay it *out of the property of the deceased*, a trust which the representative undertakes only if he takes such property. It is not possible to impose such an obligation upon a person without his consent; and the foreign executor, having received no property from New York, has given no consent to pay. The statute cannot extend so far, and it is submitted should not have such a construction; it has a perfectly legitimate application otherwise. It allows foreign representatives to sue, where there are no domestic representatives; a perfectly proper power for New York to bestow. It allows them to be sued when there is property of the deceased in the state; an entirely legal procedure for the application of the property to the debt.

An important additional consideration is that to allow this action enables New York to administer property which lies within another state.

CONTRACTS

I. In *Indian & General Investment Trust v. Borax Consolidated*,⁵² bonds had been issued by an American company, payable interest and principal in London. An American income tax had been deducted from the amount of interest paid. It was held that the company must pay the entire amount of interest agreed upon. As this interest was payable in London, where the loan was made, it is clear that American legislation could not affect the amount to be paid.

II. In *Langford v. Newsom*,⁵³ a warranty deed had been given in Texas to land in Oklahoma; a flaw was alleged in the title, but the grantee had not been ousted. The question was, whether the grantee could recover for breach of the warranty, without establishing an ouster. It was held that this question must be determined by the law of Oklahoma. The court treated it as a question of "the effect of the covenant." It would perhaps be better to use a more particular term. It is a question of whether a breach has occurred; this should be governed by the law of Oklahoma, the place of performance.

⁵² [1920] 1 K. B. 539.

⁵³ 220 S. W. (Tex.) 544 (1920).

TORTS

I. In *Pennsylvania Railroad v. Levine*,⁵⁴ action was brought for the death in Pennsylvania of a New York man. The Pennsylvania law, which of course governed, provided that the amount recovered should go to the relatives "in the proportion they would take his or her personal estate in case of intestacy." It was properly held that the damages must be divided among the next of kin according to the New York law.

II. The New York Workmen's Compensation Act, like that of many states, has been interpreted broadly to cover injuries in the state, and injuries outside the state in pursuance of contracts of employment made in the state; and apparently injuries outside the state where both parties were resident. The court refused to go further and permit recovery where the defendant resided within the state, but all other features of the case were foreign.⁵⁵

PROCEDURE

An Arizona statute provided that where adjacent mines have a common ingress of water or a common drainage they shall provide for drainage; in case of neglect by either, the mine paying for the entire drainage may recover from the other its share of the expense "in any court of competent jurisdiction." In a subsequent paragraph it was held that "the court shall have power to cause the removal of any rock, débris, or any other obstacle . . . where such removal is shown to be necessary to a just determination of the question involved." One Maine corporation brought suit against another, on this statute, in the Maine courts to recover the defendant's share of the drainage by the plaintiff of the adjoining Arizona mines of the two corporations. The Supreme Court held that the action would not lie, because the statute established "a purely local method of procedure and practice," enforceable only in the courts of Arizona.⁵⁶

Is this a case fairly within the well-established doctrine invoked by the court? As it is a mere action to recover money which is due

⁵⁴ 263 Fed. 557 (1920).

⁵⁵ *Baggs v. Standard Oil Co.*, 180 N. Y. Supp. (N. Y. Misc.) 560 (1920).

⁵⁶ *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 110 Atl. (Me.) 429 (1920).

from the defendant to the plaintiff, it seems to present no necessarily local procedure. No question can be raised as to the power of Arizona to create the obligation. Though the court gives no explanation of its application of the doctrine, it was doubtless based upon the second paragraph quoted: the necessity of appealing to an Arizona court for the removal of any physical obstacle to the determination of the question. This however is a proceeding to obtain evidence; and the court might have decided that either party could obtain its evidence by process in Arizona and produce it in Maine. The doctrine has heretofore been oftenest applied to efforts to enforce a peculiar form of stockholders' liability of another state, the enforcement of which according to the terms of the statute required jurisdiction over all the stockholders. It is well, however, jealously to guard defendants against actions which it is oppressive to bring in a foreign state.

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